

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

PAUL PHELPS,

Plaintiff,

v.

PEREZ, *et al.*,

Defendants.

Case No. 1:21-cv-01108-JLT-BAM (PC)

ORDER TO SHOW CAUSE WHY
DEFENDANT BETTES SHOULD NOT BE
DISMISSED FROM THIS ACTION FOR
FAILURE TO PROVIDE SUFFICIENT
INFORMATION TO EFFECTUATE
SERVICE

(ECF No. 18)

THIRTY (30) DAY DEADLINE

I. Introduction

Plaintiff Paul Phelps ("Plaintiff") is a pretrial detainee proceeding *pro se* and *in forma pauperis* in this civil rights action under 42 U.S.C. § 1983. This action proceeds on Plaintiff's first amended complaint against: (1) Defendants Townsend and Bettes for excessive force in violation of the Fourteenth Amendment; (2) Defendant Perez for supervisor liability in violation of the Fourteenth Amendment; and (3) Defendant County of Madera for *Monell* liability in violation of the Fourteenth Amendment.

II. Service by the United States Marshal

On January 6, 2022, the Court issued an order directing the United States Marshal to initiate service of process in this action upon all defendants. (ECF No. 15.) On January 19, 2022, the United States Marshal filed a return of service unexecuted as to Defendant Correctional

1 Officer Bettes. (ECF No. 18.)

2 Federal Rule of Civil Procedure 4(m) provides as follows:

3 If a defendant is not served within 90 days after the complaint is filed, the court—
4 on motion or on its own after notice to the plaintiff—must dismiss the action
5 without prejudice against that defendant or order that service be made within a
6 specified time. But if the plaintiff shows good cause for the failure, the court
must extend the time for service for an appropriate period.

7 Fed. R. Civ. P. 4(m).

8 In cases involving a plaintiff proceeding *in forma pauperis*, the Marshal, upon order of the
9 court, shall serve the summons and the complaint. Fed. R. Civ. P. 4(c)(3). “[A]n incarcerated pro
10 se plaintiff proceeding in forma pauperis is entitled to rely on the U.S. Marshal for service of the
11 summons and complaint, and . . . should not be penalized by having his or her action dismissed
12 for failure to effect service where the U.S. Marshal or the court clerk has failed to perform the
13 duties required of each of them . . .” *Puett v. Blandford*, 912 F.2d 270, 275 (9th Cir. 1990). “So
14 long as the prisoner has furnished the information necessary to identify the defendant, the
15 marshal’s failure to effect service is ‘automatically good cause . . .’” *Walker v. Sumner*, 14 F.3d
16 1415, 1422 (9th Cir. 1994), abrogated on other grounds by *Sandin v. Connor*, 515 U.S. 472, 115
17 (1995). However, where a *pro se* plaintiff fails to provide the Marshal with accurate and
18 sufficient information to effect service of the summons and complaint, the Court’s sua sponte
19 dismissal of the unserved defendant is appropriate. *Walker*, 14 F.3d at 1421–22.

20 Here, the U.S. Marshal attempted to serve Defendant Bettes with the information that
21 Plaintiff provided. However, the Marshal was informed that Defendant Bettes is no longer
22 employed by the Madera County Department of Corrections and no forwarding address was
23 provided for Defendant Bettes. (ECF No. 18.) Plaintiff therefore has not provided sufficient
24 information to identify and locate Defendant Bettes for service of process. If Plaintiff is unable to
25 provide the Marshal with the necessary information to identify and locate this defendant,
26 Defendant Bettes shall be dismissed from this action, without prejudice. Pursuant to Rule 4(m),
27 the Court will provide Plaintiff with the opportunity to show cause why Defendant Bettes should
28 not be dismissed from the action at this time.

1 **III. Conclusion and Order**

2 Based on the foregoing, it is HEREBY ORDERED that:

3 1. Within **thirty (30) days** from the date of service of this order, Plaintiff shall show
4 cause why Defendant Bettes should not be dismissed from this action; and

5 2. The failure to respond to this order or the failure to show cause will result in the
6 dismissal of Defendant Bettes from this action.

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8 IT IS SO ORDERED.

9 Dated: January 20, 2022

/s/ Barbara A. McAuliffe
10 UNITED STATES MAGISTRATE JUDGE
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